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Supreme Court, U.S.
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No. 95-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

DONALD BURTON,

Petitioner

-V.-

STATE OF NORTH CAROLINA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Irving Joyner

1512 S. Alston Avenue
Durham, North Carolina 27707
Telephone: (919) 560-6293

COUNSEL FOR PETITIONER

13 pp

QUESTION PRESENTED

1. WHETHER THE ARREST AND CONVICTION OF A CITIZEN FOR ENGAGING IN AN ARGUMENT OR VERBAL PROTEST WITH A POLICE OFFICER DURING A TRAFFIC STOP IN A PRIVATE PARKING LOT VIOLATES THE FIRST AMENDMENT?

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No. 95-_____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1995

DONALD BURTON,

Petitioner

-V.-

STATE OF NORTH CAROLINA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner Donald Burton respectfully prays that this Court issue a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered on May 17, 1995.

OPINION BELOW

The per curiam opinion of the United States Court of Appeals for the Fourth Circuit in Burton v. State of North Carolina, #94-7070 (4th Cir. 1995) is unpublished and is included in the Appendix. (App. at 1). The opinion of Magistrate Judge Sharp is also unpublished and is included in the Appendix. (App. at 3). The opinion of the North Carolina Court of Appeals is officially reported at 108 N.C. App. 219, 423 S.E.2d 484 (1992) and is also included in the Appendix. (App. at 16). The North Carolina Supreme Court did not grant Burton's Petition for Discretionary Review and that decision is reported at 333 N.C. 576, 429 S.E.2d 574 (1993).

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit affirming the lower court's denial of the Petitioner's Habeas Corpus Petition, 28 U.S.C. § 2254

(1988), was entered on May 17, 1995. (App. at 1). The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 2101(e)(1988).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part that "Congress shall make no law abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. Amend. I.

The Fourteenth Amendment to the United States Constitution provides in relevant part that "nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV.

N.C. Gen. Stat. § 14-33(b)(4) (1988) provides in relevant part:

> (b) Unless his conduct is covered under some other provision of law providing greater punishment, any

person who commits any assault, assault and battery, or affray is guilty of a misdemeanor punishable by a fine, imprisonment for not more than two years, or both such fine and imprisonment if, in the course of the assault, assault and battery, or affray, he:

> (4) Assaults a law enforcement officer...while the officer or personnel is discharging or attempting to discharge a duty of his office.

N.C. Gen. Stat. § 14-223 (1988) provides:

> If any person shall willfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge a duty of his office, he shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500), imprisonment for not more than six months, or both.

N.C. Gen. Stat. § 15A-1113(b) (1988) provides in relevant part:

> (b) Detention of Person Charged. A law enforcement officer who has probable cause to believe a person has committed an infraction may detain the person for a reasonable period in order to issue and serve him a citation.

N.C. Gen. Stat. § 20-141(a) (1994) provides:

> (a) No person shall drive a vehicle on a highway or in a public vehicular area at a speed greater than is reasonable and prudent under the conditions then existing.

STATEMENT OF THE CASE

Petitioner was arrested on January 2, 1990 and charged with exceeding a safe speed, an infraction, in violation of N.C. Gen. Stat. § 20-141(a); resisting, obstructing and delaying a law enforcement officer, in violation of N. C. Gen Stat. § 14-223; three counts of misdemeanor assault on law enforcement officers, in violation of N.C. Gen. Stat. § 14-33(b)(4), and damage to personal property, in violation of N.C. Gen. Stat. § 14-160. Petitioner's arrest resulted from a loud argument that he had with a police officer during a traffic stop in which he verbally challenged the issuance of a traffic citation. When the Petitioner refused to be quiet and to return to the car which he drove, he was arrested. Following a trial in the Durham County District Court on March 1, 1990, Petitioner was convicted of three counts of assault on law enforcement officers and of exceeding a safe speed.

Thereafter, Petitioner appealed the District Court convictions to the Durham County Superior Court for a trial de novo. On February 26, 1991, Burton was convicted of the three counts of assault on police officers. Following a timely appeal, the North Carolina Court of Appeals affirmed the convictions on December 16, 1992. State v. Burton, 108 N.C. App. 219, 423 S.E.2d 485 (1992). A Petition for Discretionary Review was denied by the North Carolina Supreme Court on May 6, 1993. State v. Burton, 333 N.C. 576, 429 S.E.2d 574 (1993).

On June 9, 1993, Petitioner sought relief in the United States District Court for the Middle District of North Carolina, pursuant to 28 U.S.C. § 2254 (1988)and consented to the jurisdiction of the Magistrate Judge. The Magistrate Judge determined that the Petitioner was "in custody" at the time the motion was filed. On August 15, 1994, the Magistrate Judge denied Petitioner's claims.

Burton v. North Carolina, No. CA-93-351 (M.D.N.C. Aug. 15, 1994).

Petitioner appealed the Magistrate Judge's opinion on September 9, 1994 to the United States Court of Appeals for the Fourth Circuit. In an unpublished opinion issued on May 17, 1995, the United States Court of Appeals for the Fourth Circuit denied Petitioner a certificate of probable cause to appeal the Magistrate Judge's order and dismissed the appeal. It is from this decision that Petitioner now seeks a Writ of Certiorari.

HOW FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

In his initial appeal to the North Carolina Court of Appeals, Petitioner raised a First Amendment challenge to his convictions. That court refused to address that issue and the North Carolina Supreme Court denied Petitioner's Petition for Discretionary Review. The First Amendment claim was raised

again in the 28 U.S.C. § 2254 (1988) Habeas Corpus petition in the United States District Court for the Middle District of North Carolina. Thus, the federal constitutional claim which is presented in this Petition was properly presented and reviewed below and is ripe for this Court's determination.

WHY THE COURT SHOULD GRANT THE WRIT

The central issue in this Petition For Certiorari is whether, consistent with the First Amendment, a citizen can be arrested and convicted for engaging in an argument or verbal protest with a police officer during a traffic stop in a private parking lot. When cases with facts similar to those present in this petition have been presented and reviewed in the past, this Court has concluded that citizens can not be prosecuted and convicted for speaking out or verbally protesting governmental conduct unless the speech is "shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest." Terminiello v. Chicago, 337 U.S. 1,4 (1949) The decision rendered in this case by the United States District Court For The Middle District Of North Carolina and affirmed by the Fourth Circuit Court Of

Appeals is in conflict with settled precedent of this Court.

> The vitality of civil and political institutions in our society depends upon free discussion. As Chief Justice Hughes wrote in DeJonge v. Oregon, 299 U.S. 353, 365, it is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected. The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes.
>
> Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, (cite omitted), is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. There is no room under our Constitution for a more restrictive view. For the alternative would lead to

> standardization of ideas either by legislatures, courts, or dominant political or community groups.

Terminiello, at 4-5.

The principle articulated by this court in Terminiello was applied in subsequent First Amendment cases where citizens had been convicted in state court because of their speech or because of speech-related activities. In Gooding, Warden v. Wilson, 405 U.S. 518 (1972), Lewis v. City of New Orleans, 415 U.S. 130 (1974), and Houston v. Hill, 482 U.S. 451 (1987), the court concluded that attempts to criminalize mere verbal protests, criticisms, disagreements, or hostility directed toward police officers violate the First and Fourteenth Amendments.

Facts presented in Gooding, Warden v. Wilson showed that the defendant, in an angry outburst, told a police officer: "White son of a bitch. I'll kill you." He also stated: "You son of a bitch, if you ever put your hands on me again, I'll cut you all to

pieces." 405 U.S. at 519-20, n. 1. In Lewis v. City of New Orleans, the defendant cursed, screamed and yelled at a police officer and said to him: "You god damn m.f., I am going to the [Superintendent of Police] about this." 415 U.S. at 131, n.1. In Houston v. Hill, the defendant, with the specific intent to prevent a police officer from arresting one of his friends, shouted at the officer: "Why don't you pick on somebody your own size? Why don't you pick on somebody my size?" 482 U.S. at 453-54, n. 1.

The defendants' convictions were reversed in each of the cases cited above because the statutes under which the defendants were prosecuted infringed upon or was interpreted in a manner that interfered with protected speech. For example, in Houston v. Hill, it was determined that , as interpreted, a Houston ordinance penalized "the mere interruption of a policeman while in the line of duty (cite omitted) and has been employed

to make arrests for , inter alia, arguing, talking, interfering, failing to remain quiet, refusing to remain silent, verbal abuse, cursing, verbally yelling, and talking loudly, walking through scene." 482 U.S. at 457. In explaining its decision, the Court stated:

> [T]he First Amendment protects a significant amount of verbal criticism and challenge directed at police officers. Speech is often provocative and challenging... [But it] is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of serious substantive evil that rises far above public inconvenience, annoyance, or unrest.

Id. at 461.

Finally, the Houston v. Hill court concluded that, as it had been interpreted by the lower courts, the Houston ordinance prohibited speech that in any manner interrupted a police officer. "The Constitution does not allow such speech to be made a crime. The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of

the principal characteristics by which we distinguish a free nation from a police state." Id.

In this case, Donald Burton engaged in an argument with a police officer during a traffic stop regarding whether Burton should receive a traffic citation for speeding. The argument occurred during daylight hours in the parking lot of an automotive parts store as the two stood at the door of the officer's police car. During the argument, Burton spoke loudly but did not curse or threaten the officer. When the officer asked Burton to go sit in the car which he drove into the parking lot, Burton refused and continued to argue. Finally, the officer told Burton he would be arrested if he did not return to his car.

The officer then arrested Burton for resisting, obstructing and delaying a law enforcement officer in violation of N. C. Gen. Stat. § 14-223 (1988). After the arrest, the officer attempted to handcuff Burton and was

unsuccessful because Burton refused to put his hands behind his back. As a result, the officer used his police radio to call for assistance. Burton did not attempt to leave the officer's presence and stayed at the police car until other officers arrived.

The question presented in this Petition for Certiorari is whether Burton's verbal protests and argument regarding the issuance of the traffic citation can constitute the basis of an arrest for resisting, obstructing and delaying a law enforcement officer.[1]

The Fourth Circuit Court of Appeals, in an unpublished opinion, summarily upheld a decision from the United States District Court for the Middle District of North Carolina which denied Donald Burton's habeas corpus petition. In affirming the District Court's opinion, the Court of Appeals adopted the

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[1]It is unclear from the jury's verdict whether Burton was convicted of either resisting, obstructing or delaying, or of all three offenses.

"reasoning of the Magistrate Judge" who reviewed Burton's habeas petition. Burton v. North Carolina, No. CA-93-351 (M.D.N..C. Aug. 15, 1994). The Magistrate Judge concluded, in his memorandum opinion, that "[t]he law under which Burton was arrested is a neutral law not aimed at speech, and it is not solely Burton's speech that led to his arrest in this case." Magistrate Judge Sharp's Memorandum Opinion at 12. According to Magistrate Judge Sharp:

> There was ample evidence in the record that Burton refused to return to his car when ordered to do so at least three times, and that the officer was therefore unable to control the situation sufficiently to assure his safety or to proceed with his normal procedures for checking registration records. Under these circumstances, the court cannot conclude that Burton's speech rights were impermissibly infringed by his arrest on the obstruction charge.

Id. at 11-12.

Simply stated, the Magistrate Judge concluded that Donald Burton was arrested because he argued loudly with the officer and did not return to his car as the officer

requested. Before he was arrested, Burton was under no legal duty to return to his car. He was not under arrest and did not attempt to leave the site. There is no evidence in the record that Burton's protests or argument constituted a breach of the peace or that the officer's safety was compromised. Burton did not threaten the officer in any way, nor did he grab the police radio to prevent the officer from speaking into it. The record is unclear as to how Burton's speech prevented the officer from calling into police headquarters for a registration check.

In support of his conclusion, the Magistrate Judge relied upon this Court's holding in Colten v. Kentucky, 407 U.S. 104 (1972). The speech in Burton's case differs significantly from the conduct of the defendant in Colten. The defendant there was not in a place in which he was privileged to be. The officer was in the process of directing traffic along a public highway that

had become congested with cars and people. The defendant's action attracted the attention of others who travelled in his entourage as he sought to intercede in a traffic matter involving a third party. Because of the congestion on the highway and the large number of people present there, the defendant's conduct, not his speech, created a dangerous situation. The Colten defendant's speech was not violative of any law; his conduct was and it was his repeated efforts to intercede into the legal affairs of another that caused his arrest.

To contrast the two situations, the defendant in Colten was attempting to involve himself in the business of another person. Donald Burton was attending to his own business. The conduct of the Colten defendant attracted the attention of a large group of people that was a part of his entourage and the parking of their cars along the roadway caused a traffic congestion. In Burton's

situation, there is no evidence that anyone was around; the private parking lot was not congested and the officer was not exposed to any risk of accident or harm. The officer, at one point in his testimony, indicated that he was concerned because he did not know the whereabouts of a passenger who rode in the car that Petitioner drove. It was clear, however, that the officer was not being threatened by anyone and the conditions present at that scene was totally different from the chaotic scene described in Colten.

Unlike the Colten defendant, Petitioner's only act was to speak in his own behalf. Not only was Burton not under arrest during the traffic stop, but under North Carolina law, Burton could not be arrested for this traffic violation. Exceeding a safe speed, the traffic violation with which Burton was charged, is an infraction under North Carolina law. An officer involved with an infraction is authorized by law to do no more than

"detain the person for a reasonable period in order to issue and serve him a citation." N.C. Gen. Stat. § 15A-1113 (1988). The statute does not authorize an arrest of the offender or even the detention of a person for the purpose of checking the automobile registration. To this extent, the effort by the detaining officer to check the registration of the car which Burton drove exceeded what was authorized by North Carolina law. In North Carolina, an arrest or detention which exceeds the powers authorized by statute is illegal. State v. Mobely, 240 N.C. 476, 83 S.E.2d 100 (1954).

At all times during the initial traffic stop, Donald Burton was in a place in which he was privileged to be. He was under no legal obligation to return to the car which he drove or to refrain from voicing his displeasure at being detained by the officer. It is thus difficult to sustain a conclusion that Burton's refusal to return to his car

constituted unlawful interference or delay. This is particularly true where Burton's mere presence did not prevent the officer from using the police radio. Although he held the police radio in his hand at some point during the argument, the record indicates that the officer never attempted to speak into it.

When determining what Burton did during the traffic stop to justify an arrest, the only answer is that he argued loudly with the officer. In every respect, Burton's speech was not threatening and was more civil than that presented in Houston v. Hill, Lewis v. City of New Orleans, or Gooding, Warden v. Wilson. There was no physical interference present and Burton's mere presence in a place he had a right to be is legally insignificant.

After the officer placed Burton under arrest, Burton did not attempt to leave the scene, ceased arguing with the officer and waited quietly at the police car until two other officers arrived at the scene as backup.

After the backup officers arrived, all three attempted to handcuff Burton. This effort by the officers resulted in Burton being wrestled into the front seat of the police car. The prosecution and subsequent convictions for the assaults on the police officers resulted when Burton fought back after the officers wrestled him into the police car.

The statute under which Burton was initially arrested is speech neutral. N.C. Gen. Stat. § 14-223 (1988) provides:

> If any person shall willfully and unlawfully resist, delay, or obstruct a public officer in discharging or attempting to discharge a duty of his office, he shall be guilty of a misdemeanor punishable by a fine to exceed five hundred dollars. ($500), imprisonment for not more than six months, or both.

As interpreted by the North Carolina Court of Appeals, N.C. Gen. Stat. § 14-223 criminalizes Burton's Speech. State v. Burton, 108 N.C. App. 219, 423 S.E.2d 484 (1992). Although the statute on its face

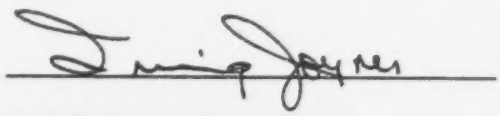
passes constitutional scrutiny, its application to Donald Burton's speech and protest is unconstitutional and is very similar to the interpretation of the speech neutral statute that was condemned by this Court in Houston v. Hill. As interpreted by the North Carolina Court of Appeals, N.C. Gen. Stat. § 14-223 (1988) prohibits verbal interruptions of police officers and for this reason, Burton's conviction should be reversed.

This court reversed the defendant's conviction in Lewis v. City of New Orleans, supra because the overbroad statute in that case punished any spoken words and not just those fighting words that "by their very utterance inflict injury or tend to incite an immediate breach of the peace." Id. at 133. Burton's speech did not constitute "fighting words" and did not, by mere utterance, incite or promote a breach of the peace.

CONCLUSION

For the reasons discussed above, Petitioner respectfully requests that this Court issue a Writ of Certiorari to review the opinion of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted, this the 10th day of August, 1995.



Irving Joyner
512 S. Alston Avenue
Durham, N.C. 27707

Telephone: (919) 560-6293

COUNSEL FOR PETITIONER

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IN THE SUPREME COURT OF THE UNITED STATES

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DONALD BURTON,

Petitioner

-V.-

STATE OF NORTH CAROLINA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPENDIX

APPENDICES

1. Burton v. State of North Carolina, No. 94-7070 (4th Cir. May 17, 1995)unpublished opinion..... 1

2. Burton v. State of North Carolina, No. CA-93-351 (M.D.N.C. Aug.15, 1994)..... 3

3. State of North Carolina v. Burton, 108 N.C. App.219, 423 S.E.2nd 484 (1992)..... 26

4. N.C. Gen. Stat. § 14-223 (1988)..... 39

5. N.C. Gen. Stat. § 15A-1113 (1988)..... 39

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 94-7070

DONALD BURTON,
Petitioner - Appellant

versus

STATE OF NORTH CAROLINA; ATTORNEY GENERAL OF NORTH CAROLINA,
Respondents - Appellees

Appeal from the United States District Court for the Middle District of North Carolina, at Durham. Paul Trevor Sharp, United States Magistrate Judge. (CA-93-351)

Submitted:April 20, 1995 Decided:May 17, 1995

Before WIDENER, WILKINSON, and WILKENS, Circuit Judges.

Dismissed by unpublished per curiam opinion

Irving Joyner, NORTH CAROLINA CENTRAL UNIVERSITY, Durham, North Carolina, for Appellant. Clarence Joe DelForge, III. OFFICE OF THE ATTORNEY GENERAL OF NORTH CAROLINA, for Appelles.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6

PER CURIAM:

Appellant seeks to appeal the magistrate judge's order[1] denying relief on his 28 U.S.C.§ 2254 (1988) petition. We have reviewed the record and the magistrate judge's opinion, and find no reversible error. Accordingly, we deny a certificate of probable cause to appeal and dismiss the appeal on the reasoning of the magistrate judge. Burton v. North Carolina, No. CA.-93-351 (M.D.N.C. Aug. 15, 1994). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the Court and argument would not aid the decisional process.

DISMISSED

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[1]The parties consented to the jurisdiction of the magistrate judge pursuant to 28 U.S.C. § 636(C) (1988).

(filed: August 15, 1994 in the office of the Clerk, U.S. District Court, Greensboro, N.C.)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

DONALD BURTON,	)	
	)	
Petitioner,	)	
	)	
v.	)	**1:93CV00351**
	)	
STATE OF NORTH CAROLINA AND THE NORTH CAROLINA ATTORNEY GENERAL	)	
	)	
Respondents.	)	
	)	

MEMORANDUM OPINION

SHARP, Magistrate Judge

Petitioner Burton brings this action pursuant to 28 U.S.C. § 2254, challenging his February 1991 conviction in Durham county Superior Court. Burton alleges that his First, Fourth, and Fourteenth Amendment rights have been violated. Both parties have filed motions for summary judgment, and the matter

is now before the court[1] for decision on the merits.[2]

BACKGROUND

A. The Underlying Offense

At trial in state court, the State's evidence tended to show that on January 2, 1990, Sergeant Charles Tiffin of the Durham, North Carolina Police Department observed Petitioner driving a red Corvette on Briggs

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[1]The parties have consented to the jurisdiction of the United States Magistrate Judge pursuant to 28 U.S.C. § 636(c).

[2]On November 24, 1993, this court on its own motion raised the issue of jurisdiction, noting that there was no indication in the file that Petitioner was "in custody," for purposes of his habeas claim, at the time he filed this action. The court ordered the parties to provide a certified copy of the record of Burton's state court proceedings as well as any jurisdictional arguments. Review of the record and the parties' submissions reveals that at the time the motion was filed, Petitioner was in custody for purposes of establishing jurisdiction under 28 U.S.C. § 2254(a).

Avenue in Durham. (Tr. 65) Tiffin was driving a marked police car and met the Corvette as it crested a hill traveling in the opposite direction. (tr. 65) Tiffin observed the car for two to three seconds and estimated that the car was traveling 55 miles per hour in a 35 mile per hour zone. (Tr. 66) The red Corvette was the only car on Briggs Avenue at that time and Tiffin did not lose sight of it from the point he first observed the vehicle until the vehicle stopped and Petitioner Burton stepped out. (Tr. 67)

After estimating the Corvette's speed, Tiffin turned around and followed the Corvette for about a half mile, activating his blue lights and continuing to follow the car until it turned into the parking lot of an auto parts store at the corner of Bacon and Lawson Streets. (Tr. 67) Tiffin pulled up behind the Corvette.

The Corvette parked in a diagonal

position and Burton and another person got out of the car and started walking away from it. (Tr. 68) Tiffin approached Burton and asked if Burton would speak with Tiffin for a minute. (Tr. 68)

Tiffin noticed that Burton was wearing a mechanic's uniform. Tiffin asked Burton if he was test driving the Corvette. (Tr. 69) Burton became hostile and asked, "What are you talking about?" (Tr. 69) Tiffin told Burton that Burton had been exceeding the speed limit and that this caused Tiffin to wonder if that was for purposes of testing the car. (Tr. 69) Tiffin asked to see Burton's driver's license and registration. (Tr. 69) Instead, Burton gave Tiffin a business card. (Tr. 69) When Tiffin indicated he did not need a business card, Burton handed him a driver's license. Burton stated that he did not have the registration and the car belonged to a customer. (Tr. 69)

Tiffin told Burton to remain at the Corvette and walked back to his police car to determine if the Corvette was legally registered or if it had been stolen. (Tr. 69-70) Burton walked over to the police car and in a very loud and agitated voice asked Tiffin, "What's going on; what are you doing?" (Tr.70) Burton became louder, asking Tiffin repeatedly what he was doing and stating that Tiffin could not charge Burton with speeding because there was no radar in the patrol car. (Tr. 71)

Tiffin repeated his instruction that Burton go and sit in his car. At that point Tiffin was seated in his police car with his radio microphone in hand and Burton was standing outside the open car door, still refusing to return to the Corvette. (Tr. 72) Tiffin warned Burton that Burton was interfering with Tiffin's ability to do his job. Tiffin testified that he was concerned

about his safety because Burton was standing over him yelling and the other subject was out of view. (Tr. 72)

Because Tiffin could not use the radio while watching the two subjects and attempting to get Burton to go and sit in his car, he was unable to check the car's registration. (Tr. 72-73) Tiffin warned Burton again that Burton was interfering with Tiffin's job and that Burton could be arrested if he did not go back to his car. (Tr. 73-74 Burton refused again to return to the Corvette and continued to question whether Tiffin knew what he was doing. (Tr. 74) Tiffin stepped out of his car, placed his hand on Burton's shoulder, and told Burton that he was under arrest. (Tr. 74)

Because Burton refused to obey instructions to turn around to be handcuffed and searched, Tiffin placed his hand on Burton's shoulder in an attempt to turn him

around and lean him over the vehicle. (Tr.78) Tiffin reached into the police car to get his nightstick and said, "We don't need to escalate to the use of the nightstick, okay?" (Tr. 78) Burton was asked again to comply and he again refused. Tiffin put the nightstick back into the car and called for another unit to assist in making the arrest. (Tr. 78-79)

While the two waited for the officer to arrive, Burton folded his arms and leaned against the patrol car, where he remained near the open door of the car. Tiffin stood in front of him to prevent him from leaving. (Tr. 79) After about two minutes, Officer Taylor arrived. (Tr. 79)

When Taylor arrived, Tiffin told him that Burton was under arrest for resisting, delaying and obstructing an officer in the performance of his duties and asked Taylor to help him make the arrest. (Tr. 79-80) Taylor told Burton that he was under arrest and asked

him to put his hands on the car. Burton did not respond. (Tr. 80)

A third officer, Corporal Allen, arrived and the three attempted physically to turn Burton around. (Tr. 80) At that point, they were struggling with him to get hold of his arm or a leverage point to turn him around. (Tr. 80) As they struggled, they slid down against the car and Burton fell into the open front car door. The three police were on top of Burton trying to get him out of the police car, which was still running and which contained weapons in the front seats. (Tr.80-81)

Burton began to resist violently. (Tr.81) Initially, Burton had been holding his hands away from the offices and trying to resist any attempts for the officers to turn him around. (Tr. 81) Once inside the car, Burton grabbed and squeezed Taylor's hand and grabbed Allen's hand and tried to bite it.

(Tr. 81) Burton kicked and grabbed Taylor's face. (Tr. 81) He kicked Tiffin in the shin. (Tr. 81) After a struggle, the officers got Burton out of the car and onto the ground, where they were able to handcuff him. (Tr. 84)

Petitioner was charged with exceeding safe speed, resisting, delaying, and obstructing an officer in the performance of his duties, injury to personal property, and three counts of assault on police officers.

B. State Court Proceedings

Petitioner's case was originally tried during the March 1, 1990 Session of District Court in North Carolina's Fourteenth Judicial District. Petitioner was charged with one court of exceeding a safe speed in violation of N.C. Gen. Stat. § 20-141(a)' one count of resisting, obstructing and delaying a law enforcement officer in violation of N.C. Gen. Stat. § 14-223; and three counts of

misdemeanor assault on a law enforcement officer in violation of N.C. Gen. Stat. § 14-33(b)(4). Verdicts of guilty were returned against Petitioner on the three counts of assault on a law enforcement officer and the single count of exceeding a safe speed.

Petitioner appealed to Durham County Superior Court, where, on February 26, 1991, after pleading not guilty to all charges against him, Burton was again convicted of the three counts of assault on a police officer.[3] On December 15, 1992, the North Carolina Court of Appeals affirmed the conviction. 108 N.C. App. 219, 423 S.E.2d 485. Burton's petition for Discretionary Review was denied by the North Carolina Supreme Court on May 6, 1993.

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[3]Before trial, the judge dismissed the charge of resisting, obstructing and delaying an officer on grounds of double jeopardy, no verdict apparently having been returned on that charge in the District curt, and at the close of the State's case, he also dismissed the charge of exceeding a safe speed.

333 N.C. 576, 429 S.E.2d 574.

On June 9, 1993, Burton filed the instant case in this court, challenging his convictions on the three assault charges.

DISCUSSION

In his complaint, Petitioner raises three grounds for habeas corpus relief: (1) His convictions were obtained in violation of his right to free speech under the First Amendment; (2) Officer Tiffin's seizure of Burton without probable cause violated the Fourth Amendment; and (3) The officers' seizure of Petitioner and the physical force they used violated his Fourteenth Amendment liberty interest.

A. The First Amendment Claim

Burton first alleges that his convictions for assault on a law enforcement officer are unlawful because the actions for which he was initially arrested constituted speech protected under the First Amendment. Under

North Carolina law, a person cannot be convicted of assault on a law enforcement officer if the assault occurred in the course of resisting an illegal arrest. See State v. Mobley, 240 N.C. 476, 83 S.E.2d 120(1954). Burton contends that his initial arrest for resisting, delaying and obstructing an officer was violative of his First Amendment rights and therefore illegal. If so, he was then privileged to resist the officers' attempts to arrest him and his convictions cannot stand. The court must therefore analyze the legality of Burton's initial arrest for resisting, delaying and obstructing a law enforcement officer in the performance of his or her duties.

North Carolina General Statute section 14-223 (1993) provides as follows:

> If any person shall willfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge a duty of his office, he shall be guilty of a

> misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both.

North Carolina Courts have held that this statute is not unconstitutionally vague, State v. Singletary, 73 N.C. App. 612, 614-15, 327 S.E.2d 11 (1985), provides a person of ordinary intelligence fair notice of the behavior proscribed, id. at 615, and that one purpose of the section is to enforce orderly conduct in the important mission of preserving the peace. State v. Leigh, 278 N.C. 243, 179 S.E.2d 708 (1971). Further, in State v. Singletary, supra, the Court of Appeals held that

> [C]ommunications intended merely to assert rights, clarify a misunderstanding, or gain information in a peaceable and orderly manner...are not chilled [by section 14-223]. Those intended to hinder or prevent an officer from carrying out his duty admittedly are discouraged by the statute, and we have found that these restrictions are in the public interest and not so intrusive as to violate the First

or Fourteenth Amendments.

Id. at 615 (citing State v. Leigh, 278 N.C. at 251, 179 S.E.2d at 713).

In State v. Leigh, 278 N.C. 243, the North Carolina Supreme Court analyzed section 14-223 under principles of First Amendment jurisprudence and found that it passed constitutional muster. The court noted that "[f]reedom of speech is not an unlimited, unqualified right," id. at 250, and that it may be restricted in the public interest. Id. The court also pointed out that when a course of conduct has been otherwise properly declared illegal, there is no abridgement of freedom of speech because the illegal conduct is initiated or carried out by the spoken or written word." Id.

Petitioner compares his case with a series of United States Supreme Court opinions in which the Court struck down laws forbidding opprobrious speech directed toward police

officer. See, e.g., Lewis v. City of New Orleans, 415 U.S. 130 (1974) (striking down as facially overbroad an ordinance making it a crime "for any person wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty")' Gooding v. Wilson, 405 U.S. 518 (1972) (statute prohibiting "opprobrious words or abusive language, tending to cause a breach of the peace" is on its face unconstitutionally vague and overbroad under First and Fourteenth Amendments). Those cases are inapposite to this case, however, because Burton was arrested pursuant to a facially neutral statute not aimed at speech per se nor any particular brand of speech.

One case to which Burton refers the court, City of Houston v. Hill, 482 U.S. 451 (1987), underscores the difference between

impermissible speech-based ordinances and those that are neutral, as that at issue in the instant case. In Hill, the petitioner was arrested for "wilfully or intentionally interrupt[ing] a city policeman...by verbal challenge during an investigation," in violation of a municipal ordinance making it illegal to "in any manner oppose, molest, abuse or interrupt any policeman in the execution of his duty." Id. at 454-55. Central to the Court's analysis was its view that the ordinance was not narrowly tailored to prohibit either "fighting words" or conduct interfering with an officer's duties. The court offered the following examples of ordinances that could permissibly accomplish the city's legitimate goals of facilitating law enforcement:

> In any case, today's decision does not leave municipalities powerless to punish physical obstruction of police action. For example, Justice Powell states that

> "a municipality constitutionally may punish an individual who chooses to stand near a police officer and persistently attempt to engage the officer in conversation while the officer is directing traffic at a busy intersection.
> ....
>
> Justice Powell also observes that "contentious and abusive " speech can interrupt an officer's investigation, and offer as an example a person who "run[s] beside [an officer pursuing a felon] in a public street shouting at the officer." But what is of concern in that example is not simply contentious speech, but rather the possibility that by shouting and running beside the officer the person may physically obstruct the officer's investigation. Although that person might constitutionally be punished under a tailored statute that prohibited individuals from physically obstructing an officer's investigation, he or she may not be punished under a broad statute aimed at speech.

Id. at 463, n. 11.

The facts of the case at bar closely parallel the examples above listed by the Court. Burton was properly subject to arrest, not for the content of his speech or the fact

that it was contentious, but for the fact that he was physically interfering with Officer Tiffin's performance of important duties. Cf. Colten v. Kentucky, 407 U.S. 104, 109 (1971) (upholding petitioner's conviction for disorderly conduct, based on his refusal to obey police order to leave a congested roadside where his friend in another car was being ticketed. "[Petitioner] insists that... he was disseminating and receiving information. But this is a strained, near-frivolous contention and we have little doubt that Colten's conduct in refusing to move on after being directed to do so was not, without more, protected by the First Amendment.").

In analyzing section 14-223 as applied to Burton, the court is also mindful of the state trial court's efforts to safeguard Petitioner's speech rights. The trial court gave the following instruction to Burton's jury:

> Merely remonstrating with an officer, protesting, objecting, questioning or criticizing an officer when he is performing his duties, does not amount to delaying and interfering an officer, they [sic], in temperance [sic] language, used without apparent purpose is not always an indispensable ingredient of the offense of interfering with an officer in the discharge of his duty, mere[ly] remonstrating or criticizing an officer is not usually held to be the equivalent of unlawful interference.

(Tr. 292) Notwithstanding this instruction, the jury found Burton guilty of assault on the law enforcement officers; this verdict necessarily includes a finding that the arrest of Burton for "willfully and unlawfully resist[ing], delay[ing] or obstruct[ing] a public officer in discharging or attempting to discharge a duty of his office" was proper. There was ample evidence in the record that Burton refused to return to his car when ordered to do so at least three times, and that the officer was therefore unable to control the situation sufficiently to assure

his safety or to proceed with his normal procedures for checking registration records. Under these circumstances, the court cannot concluded that Burton's speech rights were impermissibly infringed by his arrest on the obstruction charge.

The law under which Burton was arrested is a neutral law not aimed at speech, and it was not solely Burton's speech that led to his arrest in this case. Thus, Petitioner's First Amendment claim must fail. His conviction for assault on the law enforcement officers are not invalid products of an illegal arrest.

B. The Fourth and Fourteenth Amendment Claims

Petitioner's second and third grounds for relief may be addressed more briefly. Burton alleges that Officer Tiffin seized him without probable cause, thereby violating the Fourth and Fourteenth Amendments. This claim is brought in his petition for habeas corpus

relief under 42 U.S.C. § 2254. A claim of arrest in violation of the Fourth Amendment, however is not cognizable in an action under section 2254 because such claim does not challenge the conviction itself.[4] Likewise, Burton's Fourteenth Amendment challenge to the officers' seizure of him and use of force is not properly brought as a habeas corpus action.

Challenges to illegal arrest and excessive force are normally brought under 42 U.S.C. § 1983, which prohibits deprivation of rights secured by the Constitution or other laws by a person acting under color of state law. The potential remedy in such suits is

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[4]To any extent Petitioner means to argue that his assault conviction should be set aside because he was resisting an illegal arrest, i.e an arrest without probably cause, such a claim fails. The State's evidence, summarized at the outset of this opinion, clearly shows probably cause for Burton's arrest for obstructing a police officer.

monetary or injunctive relief. As the Fourth Circuit has stated, "Ordinarily, a claim of illegal arrest presents no ground for habeas corpus relief when a convicted criminal defendant does not claim that he was denied a fair trial by the introduction of evidence which came from the illegal arrest." Crowell v. Zahradnick, 571 F.2d 1257, 1259 n.3 (4th Cir. 1977). See also Gerstein v. Pugh, 420 U.S. 103, 119 (1975) ("[I]llegal arrest or detention does not void a subsequent conviction.').

Because probable cause to arrest and use of force during arrest are not reviewable as independent claims in a habeas setting, Burton's Fourth and Fourteenth Amendment challenges must therefore be dismissed.

CONCLUSION

For the foregoing reasons, Petitioner's

petition for habeas corpus relief is **DENIED**. A Judgment dismissing this action will be entered contemporaneously with this Memorandum Opinion.

s/
P. Trevor Sharp, U. S. Magistrate Judge

August 15, 1994

filed by the defendant was required to be timely filed in accordance with Rule 12 of the Rules of Civil Procedure, which generally requires the defendant to serve his answer within 30 days from the service of the summons and complaint upon him. Even with the extension of 30 days allowed by the court in this case, the defendant has met the "reasonable inquiry" requirement of Rule 11. There is, in my opinion, no evidence that the investigative efforts suggested by the dissent could have been conducted within the applicable time constraints placed upon the defendant.

STATE OF NORTH CAROLINA v. DONALD BURTON

No. 9114SC460

(Filed 15 December 1992)

1. **Appeal and Error § 344 (NCI4th)— motion to dismiss—motion to set aside verdict—evidence introduced after close of State's evidence—right to appeal denied**

A defendant waived the right to appeal the denial of his motion to dismiss at the close of the State's evidence where he introduced evidence after the close of the State's evidence and waived the right to appeal the denial of his motion to set aside the verdicts where he failed to address the issue in his brief. N.C.R. App. 28(b)(5); N.C.R. App. 10(b)(3).

Am Jur 2d, Appeal and Error §§ 248, 430, 431.

2. **Assault and Battery § 60 (NCI4th)— assault on an officer—sufficiency of evidence**

A jury in a prosecution for assaulting an officer could reasonably conclude that officers were attempting to lawfully arrest defendant for resisting, delaying, and obstructing a police officer when the assault occurred, and defendant's motion to dismiss was properly denied, where officers had probable cause to believe that defendant willfully prevented Sergeant Tiffin from performing his duties concerning a traffic stop. The State presented evidence that Sergeant Tiffin observed defendant traveling at a speed estimated to be twenty m.p.h. greater than the posted speed limit; Sergeant Tiffin attempted to use his car radio to run a check on the registration of the vehicle

after stopping defendant; defendant stood beside the patrol car, spoke in a loud and hostile manner, and refused to return to his car after the officer requested three times that he do so; Sergeant Tiffin was concerned for his safety as a result of defendant's behavior; he was unable to communicate on the radio; and he warned defendant that he would arrest defendant for obstructing an officer, but defendant did not desist. N.C.G.S. § 14-33(b)(8); N.C.G.S. § 14-223.

Am Jur 2d, Assault and Battery § 107.

3. Arrest and Bail § 96 (NCI4th)— assault on an officer—use of force by officers—not excessive

A jury in a prosecution for assaulting an officer could reasonably conclude that officers did not use excessive force in arresting defendant for resisting an officer and that defendant was not entitled to resist in any manner where defendant was stopped for speeding; stood next to the patrol car, talked in a loud and hostile manner, and refused to return to his car while the officer attempted to radio a check on the registration; after warning defendant several times, the officer (Sergeant Tiffin) attempted to arrest defendant for obstruction and placed his hand on defendant's shoulder to execute the arrest; defendant did not respond and leaned against the patrol car; Sergeant Tiffin and Officer Taylor, who had arrived at the scene to assist Sergeant Tiffin, attempted to turn defendant around and handcuff him but were unable to do so; Corporal Allen arrived and the three officers attempted to secure defendant; defendant fell into the patrol car; and Officer Taylor struck defendant twice on the wrist with a nightstick after defendant attempted to bite Corporal Allen, kicked Sergeant Tiffin in the shin causing injury, and dislocated Officer Taylor's thumb.

Am Jur 2d, Arrest §§ 80, 81.

4. Indictment, Information, and Criminal Pleadings § 50 (NCI4th)— indictment—assaulting an officer—underlying arrest dismissed —no variance

There was not a fatal variance between warrant allegations and the evidence presented at trial where defendant was charged with resisting, obstructing and delaying an officer and three counts of assault on a police officer; the resisting, obstructing, and delaying charge was dismissed prior to jury

selection; and defendant was convicted of three counts of assault on a police officer. The State presented evidence that the officers had probable cause to believe that defendant was resisting, obstructing, and delaying an officer in the performance of his official duty; an officer does not have to be attempting an arrest in order to be performing an official duty of his office. Certainly an officer is performing an official duty when he stops a vehicle for speeding and attempts to use his car radio to obtain information on the registration of the stopped vehicle.

Am Jur 2d, Assault and Battery § 95.

5. **Assault and Battery § 60 (NCI4th)— assault on an officer—request for further instructions—definition of obstructing—no plain error**

There was no plain error in a prosecution for assault on an officer arising from an attempted arrest for obstructing an officer where the jury requested an additional instruction on the definition of "obstruct," and the definition given at that point did not include the necessary element of willfulness. In convicting defendant, the jury must have determined that he acted willfully when he refused to return to his car as requested by the officer and repeatedly talked in a loud voice as the officer attempted to use the patrol car radio. The Court of Appeals was not convinced that the jury would have reached a different result absent the alleged error.

Am Jur 2d, Trial §§ 1448, 1449.

6. **Evidence and Witnesses § 2973 (NCI4th)— assault on an officer—cross-examination of officer—alleged misconduct—questions properly excluded or no prejudice**

Two questions asked of an officer on cross-examination during a prosecution for assault on an officer were properly excluded because they dealt with complaints and discipline against the officer and did not address his character for truthfulness or untruthfulness. While the third question specifically addressed the officer's veracity and should have been allowed, defendant failed to prove that there was a reasonable possibility that the outcome of the trial would have

been different if the excluded evidence had been admitted. N.C.G.S. § 8C-1, Rule 608(b); N.C.G.S. § 15A-1230(a).

Am Jur 2d, Evidence § 342.

7. **Criminal Law § 438 (NCI4th)— assault on an officer—prosecutor's closing argument—no prejudicial error**

There was no prejudicial error in a prosecution for assault on an officer where the prosecutor commented in his closing argument on the lack of use of sirens in stopping cars for traffic violations; on defendant's snickering as officers described his conduct and their injuries; and that defendant's testimony was consistent with that of the officers except for two parts he "made up" and how victims ended up becoming the defendant. Although the comment on use of sirens may have encompassed matters outside the record, the charges of assault on officers were not related directly to the initial traffic stop; urging jurors to observe defendant's demeanor for themselves does not inject the prosecutor's opinions into his argument; and while the last comment was improper, it did not constitute such gross impropriety as to influence the verdict of the jury.

Am Jur 2d, Trial §§ 554-556, 609, 637, 664-666, 681.

Appeal by defendant from judgment entered 25 February 1990 by Judge Frank Brown in Durham County Superior Court. Heard in the Court of Appeals 11 February 1992.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General, Ralph B. Strickland, Jr., for the State.

Irving Joyner for defendant appellant.

COZORT, Judge.

Defendant was charged with operating a motor vehicle at a speed greater than reasonable under the conditions then existing; resisting, delaying, and obstructing an officer in the performance of his duties; injury to personal property; and three counts of assault on a police officer. In Durham County District Court, defendant was found guilty of three counts of assault on a police officer and appealed the conviction to superior court. On appeal to superior court, the jury found defendant guilty of three counts of assault on a police officer in violation of N.C. Gen. Stat. § 14-33(b)(8) (1991

Cum. Supp). Defendant was fined $100.00 and sentenced to six months in prison, suspended, and one year unsupervised probation. Defendant appeals. We find no error.

The State presented the following evidence: On 2 January 1990, at approximately 4:00 p.m., Durham Police Sergeant C. M. Tiffin observed defendant driving a vehicle on a city street. Sergeant Tiffin concluded that defendant was traveling approximately 55 m.p.h. in a 35 m.p.h. zone. Sergeant Tiffin activated his blue lights and followed defendant to the parking lot of an auto parts store. Sergeant Tiffin approached defendant who was walking away from the store, and informed him that he was driving too fast. Upon Sergeant Tiffin's request for his driver's license, defendant first produced a business card and then his driver's license. Defendant was not the owner of the car and did not possess the registration. Defendant stood to the left of the police car as Sergeant Tiffin attempted to use the car radio to run a check on the registration. Defendant repeatedly questioned Sergeant Tiffin's actions and refused to return to his car, even after Sergeant Tiffin instructed him to do so three times. Sergeant Tiffin informed defendant that he would be placed under arrest if he did not stop interfering and obstructing him in the performance of his duties. After defendant refused to cooperate, Sergeant Tiffin placed defendant under arrest and called for assistance. Officer T. M. Taylor arrived on the scene, but he and Sergeant Tiffin were unable to secure custody of defendant. Corporal C. M. Allen arrived to assist his fellow officers. A struggle ensued, and defendant fell into the open door of the patrol car. Sergeant Tiffin instructed Officer Taylor to strike defendant with his nightstick. Officer Taylor responded by striking defendant twice on the wrist. As a result of the struggle, Officer Taylor suffered a dislocated thumb and Sergeant Tiffin suffered injury to his shin. Defendant was finally brought under control.

Defendant presented the following evidence: Defendant was driving a vehicle at 30 or 35 m.p.h. when Sergeant Tiffin stopped him. Defendant questioned Sergeant Tiffin about the detention and his actions. After the other officers arrived on the scene, defendant asked to speak to a superior officer. Defendant refused to cooperate as the officers tried to handcuff him, and Officer Taylor struck defendant on the head with his nightstick.

On appeal defendant argues that the trial court erred in (1) denying defendant's motions to dismiss at the close of State's

evidence and the close of all the evidence, to vacate the verdicts after their return, and to set aside the verdicts; (2) instructing the jury on request that they were to give the term "obstruct" its ordinary meaning; (3) denying defendant the opportunity to cross-examine Sergeant Tiffin about alleged misconduct; and (4) allowing the assistant district attorney to make certain remarks during closing argument.

[1] N.C.R. App. P. 10(b)(3) provides in part that "if defendant makes [a motion to dismiss the action] after the State has presented all its evidence and has rested its case and that motion is denied and the defendant then introduces evidence, his motion for dismissal or judgment in case on nonsuit made at the close of State's evidence is waived." Since defendant introduced evidence after the close of State's evidence, he has waived the right to appeal the denial of his motion at the close of State's evidence. Defendant has also waived the right to appeal the denial of his motion to set aside the verdicts, since he has failed to address the issue in his brief. N.C.R. App. P. 28(b)(5).

[2] Therefore, we need consider only defendant's argument that the trial court erred in failing to dismiss the action at the close of all the evidence. The trial court must dismiss charges for insufficiency of the evidence, if, viewing the evidence in the light most favorable to the State, the State fails to present substantial evidence of each essential element of the offenses charged. *State v. Herring*, 322 N.C. 733, 738, 370 S.E.2d 363, 367 (1988). "Substantial evidence is such evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* Specifically, defendant argues that (1) the officer did not have probable cause to arrest him for resisting arrest; (2) he was entitled to protect himself against use of excessive force by the police officers; and (3) there was a fatal variance between the warrant allegations and the State's evidence.

N.C. Gen. Stat. § 14-33(b)(8) provides that a person is guilty of a misdemeanor if he assaults a law enforcement officer when the officer is discharging or attempting to discharge a duty of his office.

> In order to obtain a conviction under [this section], the burden is on the State to satisfy the jury from the evidence and beyond a reasonable doubt that the party assaulted was a law enforcement officer performing the duty of his office, and

that the defendant knew his victim was a law enforcement officer.

State v. Rowland, 54 N.C. App. 458, 462, 283 S.E.2d 543, 546 (1981). " '[T]he offense under [this section]' . . . presupposes lawful conduct of the public officer in discharging . . . a duty of his office." *State v. Jefferies*, 17 N.C. App. 195, 198, 193 S.E.2d 388, 391 (1972), *cert. denied*, 282 N.C. 673, 194 S.E.2d 153 (1973) (interpreting former N.C. Gen. Stat. § 14-33(c)(4)). "One resisting an illegal arrest is not resisting an officer within the discharge of his official duties." *State v. Anderson*, 40 N.C. App. 318, 322, 253 S.E.2d 48, 51 (1979).

Accordingly, in order for defendant to be convicted of assault on a police officer in violation of N.C. Gen. Stat. § 14-33(b)(8), the jury must first determine whether the officers were attempting to lawfully arrest defendant for resisting, delaying, and obstructing a police officer in violation of N.C. Gen. Stat. § 14-223 (1986). A warrantless arrest is lawful if based upon probable cause. *State v. Phillips*, 300 N.C. 678, 683, 268 S.E.2d 452, 456 (1980). The question, then, is whether the officers had probable cause to arrest defendant. Probable cause " 'has been defined to be a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty.' " *State v. Zuniga*, 312 N.C. 251, 259, 322 S.E.2d 140, 145 (1984) (quoting *State v. Shore*, 285 N.C. 328, 335, 204 S.E.2d 682, 687 (1974)).

N.C. Gen. Stat. § 14-223 (1986) makes it unlawful for any person to "willfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge a duty of his office . . . ." Actual physical force or assault is not necessary. *State v. Downing*, 66 N.C. App. 686, 690, 311 S.E.2d 702, 704 (1984), *aff'd in part and rev'd in part*, 313 N.C. 164, 326 S.E.2d 256 (1985). The State does not have to prove that the officer was permanently prevented from discharging his duties by defendant's conduct. *Id.* Instead, the State must prove only that

> "the officer was obstructed or interfered with, and that such obstruction or interference was willful on the part of the defendant. . . . To 'interfere' is to check or hamper the action of the officer, or to do something which hinders or prevents or tends to prevent the performance of his legal duty; and to 'obstruct' signifies direct or indirect opposition or resistace [*sic*] to the lawful discharge of his official duty."

State v. Leigh, 278 N.C. 243, 248, 179 S.E.2d 708, 711 (1971) (quoting *State v. Estes*, 185 N.C. 752, 117 S.E. 581 (1923)). "Merely remonstrating with an officer in behalf of another, or criticizing an officer while he is performing his duty, does not amount to obstructing, hindering, or interfering with an officer." *State v. Allen*, 14 N.C. App. 485, 491, 188 S.E.2d 568, 573 (1972).

The State presented evidence that Sergeant Tiffin observed defendant traveling at a speed estimated to be twenty m.p.h. greater than the posted speed limit. On the basis of his observation and training, Sergeant Tiffin had at least reasonable suspicion to stop defendant's vehicle. *See State v. Morocco*, 99 N.C. App. 421, 393 S.E.2d 545 (1990). After stopping the defendant for speeding, Sergeant Tiffin attempted to use his car radio to run a check on the registration of the vehicle. Defendant was standing beside the patrol car and speaking in a loud and hostile manner. He refused to return to his car after the officer requested three times for him to do so. Sergeant Tiffin was concerned for his safety as a result of defendant's behavior, and he was unable to successfully communicate on the radio. He then warned defendant that he would arrest him for obstructing an officer, but defendant did not desist. Based upon the evidence presented by the State, a jury could reasonably conclude that the officers lawfully arrested defendant because they had probable cause to believe that defendant willfully prevented Sergeant Tiffin from performing his duties concerning the traffic stop.

[3] Defendant next argues that defendant had the right to protect himself against the use of excessive force during an unlawful arrest. We have already determined that a jury could reasonably conclude that the arrest was lawful. If attempting a lawful arrest, an officer has the right to use reasonable force to subdue the arrestee and the arrestee has no right to resist. N.C. Gen. Stat. § 15A-401(d)(1) (1991 Cum. Supp.). If, however, an officer uses excessive force to execute a lawful arrest, the arrestee may defend against the excessive force. *See State v. Mensch*, 34 N.C. App. 572, 575, 239 S.E.2d 297, 299 (1977), *cert. denied*, 294 N.C. 443, 241 S.E.2d 845 (1978).

The State presented evidence that after warning defendant several times, Sergeant Tiffin attempted to arrest defendant for obstruction and placed his hand on defendant's shoulder to execute the arrest. Defendant did not respond and leaned against the patrol car. Sergeant Tiffin and Officer Taylor, who had arrived at the scene to assist Sergeant Tiffin, attempted to turn defendant around

and handcuff him but were unable to do so. Corporal Allen arrived and the three officers attempted to secure defendant. Defendant fell into the patrol car. After defendant attempted to bite Corporal Allen, kicked Sergeant Tiffin in the shin causing injury, and dislocated Officer Taylor's thumb, Officer Taylor struck defendant twice on the wrist with a nightstick. A jury could reasonably conclude that the officers did not use excessive force in executing the arrest and that defendant was not entitled to resist in any manner.

[4] Defendant further argues that there was a fatal variance in the warrant allegations for resisting arrest and the State's evidence presented at trial. Defendant was charged with the offense of resisting, obstructing, and delaying in violation of § 14-223 and three counts of assault on a police officer in violation of § 14-33(b)(8). The resisting, obstructing, and delaying charge was dismissed prior to jury selection. Defendant was convicted of three counts of assault on a police officer. The State had the burden of proving that the persons assaulted were police officers performing their duties and that defendant knew they were police officers. *See Rowland*, 54 N.C. App. at 462, 283 S.E.2d at 546. In order to meet this burden, the State also had to present evidence that the officers were making a lawful arrest for resisting, obstructing, and delaying. As stated above, the State presented evidence that the officers had probable cause to believe defendant was resisting, obstructing, and delaying Sergeant Tiffin in the performance of his official duty. An officer does not have to be attempting an arrest in order to be performing an official duty of his office. Certainly an officer is performing an official duty when he stops a vehicle for speeding and attempts to use his car radio to obtain information on the registration of the stopped vehicle. We find defendant's argument that there was a fatal variance in the warrant and evidence presented at trial to be without merit.

Considering the evidence in the light most favorable to the State, we find the State presented substantial evidence of each element of the crimes charged, three counts of assault on a police officer, and that defendant was the perpetrator of the crimes. Accordingly, we find that the trial court did not err in denying defendant's motion to dismiss for insufficiency of evidence at the close of trial. Defendant's first assignment of error is overruled.

[5] In his second assignment of error, defendant contends that the trial court committed plain error when it responded to a ques-

tion from the jury concerning the definition of obstructing a police officer. Defendant does not challenge the correctness of the initial instructions here. In that charge, the trial court properly instructed the jury on the charge of assault on a police officer. The trial court then instructed the jury on the offense of resisting, delaying, and obstructing a police officer. The trial court explained that the officer had to have probable cause to believe that the defendant had committed the offense of delaying and obstructing; probable cause would exist if the circumstances surrounding defendant's conduct would lead a prudent person to believe defendant had committed the offense of delaying and obstructing. The trial court then instructed the jury that

> [m]erely remonstrating with an officer, protesting, objecting, questioning or criticizing an officer when he is performing his duties, does not amount to delaying and interfering an officer, they, in temperance language, used without apparent purpose is not sufficient, although force or threatened force is not always an indispensable ingredient of the offense of interfering with an officer in the discharge of his duty, mere remonstrating or criticizing an officer is not usually held to be the equivalent of unlawful interference.

Defendant argues that plain error occurred when the jury, after retiring for deliberation, requested in writing a definition of the phrase "obstructing an officer" and the trial court responded that the jury was to give the term "its ordinary meaning." Defendant's attorney did not object to the trial court's response to the jury's question. He now argues on appeal that the trial court's response to the jury's question was plain error, an error so fundamental that defendant must receive a new trial. He argues that the trial court's instruction to the jury that they could give the term "obstructing" its "ordinary meaning," which would not require a finding of willfulness, would allow the jury to find the defendant guilty of assault on an officer without having to first find that the officer had probable cause to arrest the defendant for the defendant's willful obstruction of the officer in the performance of his duties.

Webster's Third New International Dictionary (1971) defines obstruct: "to be or come in the way of: hinder from passing, action, or operation: IMPEDE, RETARD." The Second College Edition of the American Heritage Dictionary (1985) offers a similar definition:

"to impede, retard, or interfere with; hinder." Looking at these definitions of the "ordinary meaning" of obstruct, we agree with defendant's contention that the ordinary meaning of obstruct does not necessarily include an element of willfulness, an element which is required in the crime of obstructing an officer under N.C. Gen. Stat. § 14-223. We must now determine whether the trial court's response to the jury's question, which failed to require that the defendant's obstruction be willful in order to support the offense of assault, was so fundamental an error that a new trial is required. We hold that it was not.

After reviewing the entire record, we are not convinced "that absent the alleged error, a jury probably would have reached a different verdict." *State v. Robinson*, 330 N.C. 1, 22, 409 S.E.2d 288, 300 (1991). Here, the jury was correctly instructed that merely remonstrating or criticizing an officer did not amount to the offense of obstructing an officer. In order to convict defendant of assault on a police officer, the jury first had to determine whether there was probable cause for Sergeant Tiffin to arrest defendant for resisting, obstructing, and delaying an officer. In convicting defendant, the jury must have determined that he acted willfully when he refused to return to his car as requested by Sergeant Tiffin and repeatedly talked in a loud voice as Sergeant Tiffin attempted to use the patrol car radio. Defendant's second assignment of error is overruled.

[6] In his third assignment of error, defendant argues the trial court erred in denying defendant the opportunity to cross-examine Sergeant Tiffin about alleged misconduct. Specifically, defendant sought to ask the following questions in order to impeach the credibility of Sergeant Tiffin:

> 1. [D]uring the time that you have been employed with the Durham Police Department, have you not had a number of complaints filed against you?
>
> 2. And have you not been disciplined for some of these alleged incidents of misconduct?
>
> 3. Were you dismissed from the police department . . . for lying to your superior officers about an incident involving some officers under your command in a policemen's conduct matter?

N.C. Gen. Stat. § 8C-1, Rule 608(b) (1988) provides that specific instances of conduct may "in the discretion of the court, if probative

of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness . . . ." We find that the first two questions were properly excluded by the trial court because they do not address Sergeant Tiffin's character for truthfulness or untruthfulness. The third question, however, does specifically address the question of Sergeant Tiffin's veracity and should have been allowed. Although we find error in the exclusion of the question, defendant has failed to prove that there was a reasonable possibility that the outcome of the trial would have been different if the excluded evidence had been admitted. *See* N.C. Gen. Stat. § 15A-1443 (1988).

[7] Finally, defendant argues that the trial court erred in permitting the assistant district attorney to comment during the closing argument (1) about the lack of use of sirens in stopping cars for traffic violations; (2) about defendant's snickering as the officers described their injuries and his conduct; and (3) that "defendant's own testimony is consistent with what the officers said other than the two parts he made up, and ladies and gentlemen it always amazed me that whenever I try a case how the victims end up becoming the defendant." N.C. Gen. Stat. § 15A-1230(a) (1988) prohibits an attorney from injecting personal experiences and making arguments on the basis of matters outside the record, except for those matters of which the court may take judicial notice. "Whether counsel abuses this privilege is a matter ordinarily left to the sound discretion of the trial judge, and we will not review the exercise of this discretion unless there be such gross impropriety in the argument as would be likely to influence the verdict of the jury." *State v. Covington*, 290 N.C. 313, 328, 226 S.E.2d 629, 640 (1976) (citations omitted.) Addressing the first comment, although the statement may have encompassed matters outside the record, we do not find the statement to be prejudicial to defendant. As the State points out, the charges of assault on police officers were not related directly to the initial traffic stop of the defendant. As to the second comment, "urging the jurors to observe defendant's demeanor for themselves does not inject the prosecutor's own opinions into his argument, but calls to the jurors' attention the fact that evidence is not only what they hear on the stand but what they witness in the courtroom." *State v. Brown*, 320 N.C. 179, 199, 358 S.E.2d 1, 15, *cert. denied*, 484 U.S. 970, 98 L.Ed.2d 406 (1987). Finally, we find the third comment to be improper, but

we do not think the comment constitutes such gross impropriety as to influence the verdict of the jury. Defendant has failed to demonstrate prejudicial error, and his fourth assignment of error is therefore overruled.

No error.

Judges EAGLES and ORR concur.

ELIZABETH R. COVINGTON, WILLIAM JOHN EVANS, JR., LAURA M. GRIMES, NANCY L. GUTSKE, LONNIE D. HEDRICK, TRACEY S. HEDRICK, LYNN C. HOWELL, NANCY L. HUGHES, WILLIAM J. HUGHES, DORIS B. SEYMOUR, DAVID P. TRUEBLOOD, JACOB VAN KRETSCHMAR, AND TERESA VAN KRETSCHMAR, APPELLEES v. THE TOWN OF APEX; CLARICE D. ATWATER, MICHAEL JONES, EVERETT M. EDWARDS, JR. AND JACK H. KERLEY, AS MEMBERS OF THE TOWN OF APEX BOARD OF COMMISSIONERS; AND C&D INVESTMENT COMPANY, INC., APPELLANTS

No. 9110SC930

(Filed 15 December 1992)

1. **Municipal Corporations § 30.11 (NCI3d)— conditional use zoning—summary judgment—plaintiffs' forecast of evidence opposing zoning**

Plaintiffs provided sufficient evidence that a zoning change from Office and Institutional to Conditional Use Business-2 was unreasonable, arbitrary, and not in the public interest where the rezoning was sought to permit electronic assembly by a prospective tenant; defendants supported their motion for summary judgment by providing affidavits which identified the public purposes of the rezoning ordinance; one affidavit stated that the rezoning ordinance serves legitimate public purposes in that it contributes to the revitalization of downtown, promotes economic stability, and serves to promote the express statutory goal of conserving the value of buildings; plaintiffs' pleadings and supporting affidavits showed that the owners of the property voluntarily terminated their lease with their former tenant in order to execute a lease with a new tenant, which required that the property be rezoned because its line of business involved electronic assembly; the only public in-

§ 14-223. Resisting officers.

If any person shall willfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge a duty of his office, he shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1889, c. 51, s. 1; Rev., s. 3700; C. S., s. 4378; 1969, c. 1224, s. 1.)

ARTICLE 66.

§ 15A-1113. Prehearing procedure.

(a) Process. — A law enforcement officer may issue a citation for an infraction in accordance with the provisions of G.S. 15A-302. A judicial official may issue a summons for an infraction in accordance with the provisions of G.S. 15A-303.

(b) Detention of Person Charged. — A law enforcement officer who has probable cause to believe a person has committed an infraction may detain the person for a reasonable period in order to issue and serve him a citation.

(c) Appearance Bond May Be Required. — A person charged with an infraction may not be required to post an appearance bond if:

(1) He is licensed to drive by a state that subscribes to the nonresident violator compact as defined in Article 1B of Chapter 20 of the General Statutes, the infraction charged is subject to the provisions of that compact, and he executes a personal recognizance as defined by that compact.

(2) He is a resident of North Carolina.

Any other person charged with an infraction may be required to post a bond to secure his appearance and a charging officer may require such a person charged to accompany him to a judicial official's office to allow the official to determine if a bond is necessary to secure the person's court appearance, and if so, what kind of bond is to be used. If the judicial official finds that the person is unable to post a secured bond, he must allow the person to be released on execution of an unsecured bond. The provisions of Article 26 of this Chapter relating to issuance and forfeiture of bail bonds are applicable to bonds required pursuant to this subsection.

(d) Territorial Jurisdiction. — A law enforcement officer's territorial jurisdiction to charge a person with an infraction is the same as his jurisdiction to arrest specified in G.S. 15A-402.

(e) Use of Same Process for Two Offenses. — A person may be charged with a criminal offense and an infraction in the same pleading. (1985, c. 764, s. 3; 1985 (Reg. Sess., 1986), c. 852, s. 12.)

§ 15A-1114. Hearing procedure for infractions.

(a) Jurisdiction. — Jurisdiction for the adjudication and disposition of infractions is as specified in G.S. 7A-253 and G.S. 7A-271(d).

(b) No Trial by Jury. — In adjudicatory hearings for infractions, no party has a right to a trial by jury in district court.

(c) Infractions Heard in Civil or Criminal Session. — A district court judge may conduct proceedings relating to traffic infractions in a civil or criminal session of court, unless the infraction is joined with a criminal offense arising out of the same transaction or occurrence. In such a case, the criminal offense and the infraction must be heard at a session in which criminal matters may be heard.

(d) Pleas. — A person charged with an infraction may admit or deny responsibility for the infraction. The plea must be made by the person charged in open court, unless he submits a written waiver of appearance which is approved by the presiding judge, or, if authorized by G.S. 7A-146, he waives his right to a hearing and admits responsibility for the infraction in writing and pays the specified penalty and costs.

(e) Duty of District Attorney. — The district attorney is responsible for ensuring that infractions are calendared and prosecuted efficiently.

(f) Burden of Proof. — The State must prove beyond a reasonable doubt that the person charged is responsible for the infraction unless the person admits responsibility.

(g) Recording Not Necessary. — The State does not have to record the proceedings at infraction hearings. With the approval of the court, a party may, at his expense, record any proceeding. (1985, c. 764, s. 3.)